No. 56890-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ENGLISH FARM LLC and JENNIFER ENGLISH WALLENBERG,

Appellants,

v.

CITY OF VANCOUVER,

Respondent,

and

JLL, HP Inc., JENNIFER BAKER, MARIAN ENGLISH-HUSE, and DON JENNINGS,

Respondents.

BRIEF OF RESPONDENT CITY OF VANCOUVER

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I. Introduction

Respondent HP, Inc. ("HP") has ably set forth the reasons why this Court should affirm the superior court's denial of the land use petition filed by Appellants English Farm, LLC and Jennifer English Wallenberg (collectively "English Farm"). Respondent City of Vancouver ("City") need not and does not duplicate those efforts here.

Separately, English Farm brought an ancillary claim against the City based entirely on a development agreement ("DA") entered into 15 years before the land use action at the heart of this LUPA case. In essence, English Farm alleged that the DA guaranteed the economic success of their winery, and that the HP Master Plan approved by the Vancouver City Council on May 17, 2021, "breached" the 2007 DA. A plain review of the DA's terms confirms that this claim has no merit. There was never a promise of economic success, particularly success more than a decade in the future. Even under CR 12(b)(6)'s deferential standard, nothing in the HP Master Plan could even

hypothetically be construed as breaking any "promise" contained in the 2007 DA. As a result, the trial court correctly dismissed Appellants' breach of contract claim.

II. Statement of the Issues

Appellants do not describe any "issues pertaining to the assignments of error" that they raise. RAP 10.3(a)(4). The City sets forth the issues restatement pertaining to the assignments of error regarding Appellants' breach of contract claim as follows:

(1) Whether the Superior Court correctly ruled that the City owes no duty under the English Farm DA to guarantee that Appellants' winery business would be successful.

(2) Whether the Superior Court correctly ruled that the City's approval of a conceptual land use document on a different piece of property in no way impaired English Farm's ability to continue their nonconforming land uses on their own property.

(3) Whether the Superior Court correctly held that the City did not operate in bad faith with respect to the English Farm DA, even under hypothetical facts.

(4) Whether the Superior Court's order dismissing Appellants' breach of contract claim was legally sufficient, given that findings of fact by a trial court are "superfluous" when dismissing a claim pursuant to CR 12(b)(6).

III. Statement of the Case

The City incorporates by way of reference the facts as described in Section III of Respondent HP Inc.'s Answering Brief, filed June 30, 2022. In addition, the City states the following.

Fifteen years ago, in December of 2007, the Vancouver City Council approved execution of a Pre-Annexation/ Development Agreement[1] between the City and Carl D. and Gail D. English, Jennifer J. English, and Kenneth and Kelley Emerson (collectively, the "English Family"). *See* CP 7, 698-710. Pursuant to the terms[2] of this development agreement ("English

[1] Development agreements are authorized by statute. *See* RCW 36.70B.170-.210.

[2] Generally CR 12(b) prohibits consideration of any information

Farm DA"), the parties agreed that the English Family would be permitted to continue a specific list of legal nonconforming residential and winery-related uses on their property, until abandoned, consisting of the following:

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outside the four corners of the plaintiff's (or in this case, the petitioner's) initial pleading. Despite this, courts have recognized that certain types of outside information can be considered on a CR 12(b)(6) motion: (1) a written "instrument" such as a contract from which a dispute arises if its authenticity is not questioned, *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 205, 289 P.3d 638 (2012); (2) documents specifically referenced in the complaint but not attached, *Jackson v. Quality Loan Serv. Corp*, 186 Wn. App. 838, 844, 347 P.3d 487 (2015); and (3) through judicial notice, public documents if their authenticity cannot reasonably be disputed, *id.* In addition, the trial court can consider information outside of the complaint without converting a CR 12(b)(6) motion to a summary judgment motion if "the 'basic operative facts are undisputed and the core issue is one of law.'" *Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wn.2d 820, 827 n.2, 355 P.3d 1100 (2015) (quoting *Ortblad v. State*, 85 Wn.2d 109, 111, 530 P.2d 635 (1975)).

Although the English Farm DA is attached as an exhibit to the City's CR 12(b)(6) motion to dismiss, English Farm explicitly referenced it in paragraph 6.5 of their petition. CP 7, and English Farm does not dispute that the exhibit referenced is an authentic copy of the original DA. As such, this Court may consider the agreement in its entirety on review of the trial court's dismissal under CR 12(b)(6).

- Two residences located on the property;
- Vineyards;
- Retail/wholesale (sales activity);
- Wine processing;
- Office and administrative uses; and
- Events.

CP 700 (§ 3.2); *see also* CP 701 (§ 4). Section 5 of the English Farm DA also stated that the English Family could:

> . . . continue expanding the vineyards on the Properties; continue using the two residential dwellings as residences; convert the residential dwellings to other uses related to the winery, such as but not limited to, restaurant, tasting room, gift shop, bed-and-breakfast; and, construct new buildings, or modify current buildings.

CP 701 (§ 5). The above passages constitute the entirety of the "contract" into which the English Family and the City entered, and pertain solely to what the English Family may do on its own property.

On May 17, 2021, the City Council adopted Resolution No. M-4126, approving a Master Plan application that had been submitted by Respondent, HP Inc., related to future development within an area in Vancouver referred to as Section 30, on

property immediately adjacent to the English Farm winery property. CP 20-55. The Master Plan does not propose specific development and did not include any site plan review application. The plan includes building footprints, but no building heights, which will be reviewed at the time of site plan submittal. *Id.* In addition, the document explains that inclusion of building height is not required at the current review stage:

> *Section 30 has neither height limits nor floor area ratio (FAR) limits. However, HP recognizes the City's goal of achieving a distinctly urban form of development and compatibility with neighboring uses.* Buildings will vary in height, providing for active and pedestrian scale street fronts through facade articulation and the inviting appearance of the new buildings. These building heights will take into consideration mountain views for residential neighbors to the west. Anticipated FAR at full build-out is 0.5 to 1.0. Boundary treatments will be compatible with surrounding uses and employ architecturally appropriate fencing.

CP 110 (emphasis added). The Master Plan also states:

> The Full Site Utilization Plan (FSUP) shows the long-term configuration of the developed site. Development contemplated in this Master Plan is expected to take 15-20 years and possibly longer for the

> full 1.5 million GSF build-out, depending on market conditions and industry demands. Therefore, the FSUP, consistent with VMC 20.690.060.C, proposes potential sizes, locations, configurations and uses associated with full site build-out. (Emphasis added).

CP 107. In addition, the Master Plan confirms the future site plan review process: "HP's future development will be subject to site plan approvals that are consistent with this Master Plan and [HP's] Development Agreement." CP 104.

The Master Plan was approved on May 17, 2021, prompting English Farm to file this land use petition, in which English Farm also brought a breach of contract claim against the City based on the 2007 English Farm DA. CP 3-4, 17. The City moved the Court for dismissal under CR 12(b)(6), which the trial court granted. CP 1957-58.

IV. Standard of Review

Dismissal of a claim under CR 12(b)(6) is a question of law that is reviewed de novo. *Blue Spirits Distilling, LLC v. Wash. State Liquor & Cannabis Bd.*, 15 Wn. App. 2d 779, 793,

478 P.3d 153, 162 (2020) (*citing Markoff v. Puget Sound Energy, Inc.*, 9 Wn. App. 2d 833, 839, 447 P.3d 577 (2019), *review denied*, 195 Wn.2d 1013, 460 P.3d 183 (2020)). While the court presumes that all factual allegations are true and draws all reasonable inferences from those factual allegations in the plaintiff's favor, dismissal of the claim is still proper if the court concludes that no set of facts would justify recovery. *Trujillo v. NW Tr. Servs., Inc.*, 183 Wn.2d 820, 830, 355 P.3d 1100, 1105 (2015). The court may even consider hypothetical facts in order to determine whether dismissal was proper. *Id.* However, if the claim "remains legally insufficient even under [the plaintiff's] proffered hypothetical facts, dismissal pursuant to CR 12(b)(6) is appropriate." *Id.* (quoting *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311 (2005)).

Where, as here, interpretation of a contract does not require consideration of extrinsic evidence, the question becomes purely legal. *Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit*

Constr. Co., 176 Wn.2d 502, 517, 296 P.3d 821 (2013).

Because de novo review of dismissal of a claim under CR 12(b)(6) is based on the complaint and possible hypothetical facts, any findings of fact by the trial court are "superfluous." *Deegan v. Windermere Real Estate/Center-Isle, Inc.*, 197 Wn. App. 875, 884, 391 P.3d 582, 587 (2017).

V. Argument

A. The Superior Court correctly ruled that the City owes no duty under the English Farm DA to guarantee that Appellants' winery business would be successful.

"[A] contract confers no greater rights on a party than it bargains for. In other words, a party to a contract has a contractual right only to that which it bargained for--its reasonable expectation." *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 156, 43 P.3d 1223, 1228 (2002). Intent and interpretation of contractual terms are "determined from the 'four corners' of the contract, i.e. the contract is to be read and interpreted as a whole. Other evidence is admitted only if there

is an ambiguity in the contract." *Amick v. Baugh*, 66 Wn.2d 298, 303, 402 P.2d 342, 345 (1965).

Appellants contend that adoption of the HP Master Plan in 2021 breached the terms of the English Farm DA, entered into in 2007. Significantly, however, Appellants cannot and do not point to any *term* of the English Farm DA that the City's adoption of the HP Master Plan breached. The applicable terms of the English Farm DA are clear and unambiguous. Nothing in the English Farm DA's terms remotely suggests that the City guaranteed that the English Farm's winery would be a profitable business endeavor in perpetuity simply by allowing English Farm to continue certain nonconforming land uses, especially given the fact that the Section 30 Subarea was explicitly referenced in the DA as being slated for future development.

Appellants allege merely that some of the buildings proposed by HP are "likely to obstruct or change wind patterns," producing currents that "may change" how some grapes grow, and that "if the wind is mostly or entirely blocked" there could

be a "risk of grape diseases." Appellants further assert that "views and vistas" are an "integral part" of "culture and event-hosting operations." CP 10. Notably, however, the English Farm DA contains not one mention any particular view or specific wind pattern that the City promised to protect. While those things *could* arguably have an impact on the winery business, those factors are demonstrably outside the scope of any promise made by the City in the English Farm DA. Such conjectures cannot rationally be described in any way as "reasonable expectations" of a contractual arrangement whereby the City agreed to do no more than recognize that, while the winery would be a nonconforming land use under City zoning ordinances, Appellants would not be required to switch to conforming land uses instead (although they do also have that option). And while the City certainly recognized that Appellants could conduct "events" as one of the permitted uses, nothing in the English Farm DA predicates that any "event" is guaranteed to have any specific views of *anything*, let alone a purported view of a

particular mountain that apparently was not important enough to mention even once in the entire document.

B. The Superior Court correctly ruled that the City's approval of a conceptual land use document on a different piece of property caused no damages because it in no way impaired Appellants' ability to continue their nonconforming land uses on their own property.

As matters currently stand, site plan submittals remain in the hands of HP, and the City's site plan review process presents the appropriate time for Appellants to object, when and if any of their conjectural injuries manifest. Future HP decision-making about site plan submittals is in HP's sole discretion, subject to the public review process that will entail review of consistency with the Master Plan and Design Guidelines.

In breach of contract claims, "[t]o establish causation, [a claimant must] show, among other things, that [the] alleged breach . . . was a cause in fact of [the] alleged damages. . . . A cause in fact is a cause but for which the claimed damage would not have occurred." *Northwest Mfrs. v. Dep't of Labor*, 78 Wn.

App. 707, 713, 899 P.2d 6, 9 (1995). HP is a private landowner, with its own development agreement with the City, and already possesses certain development rights independent of the Master Plan approval process. For example, Section 20.690.040(B) of the Vancouver Municipal Code ("VMC") specifically provides: "Building heights shall not be restricted within the ECX zoned properties of the Plan District." This includes the property immediately adjacent to that of English Farm. If HP were to construct a massive structure that cut off air or sunlight, or both, from some of the grapes growing on Appellants' property, HP could conceivably be responsible for any resulting damages; but the City surely would not be, presuming that such construction was approved in compliance with the City's land use and development codes.

In Washington, "remote, contingent, or speculative damages are not recoverable" in a breach of contract action. *Pappas v. Zerwoodis*, 21 Wn.2d 725, 732, 153 P.2d 170 (1944). Yet that is exactly the type of damages on which Appellants have

based their breach of contract claim. Appellants do not allege, and have never alleged, that because the City approved the HP Master Plan, Appellants are now prohibited from: operating a vineyard; conducting retail or wholesale activity; processing wine; conducting office and administrative functions; or hosting events. At most, Appellants argue that one or two of these land uses *might* become more difficult, or perhaps less profitable, in the future – but the City never guaranteed Appellants' business success by virtue of agreeing to the terms of the English Farm DA.

Because this is a breach of contract claim premised exclusively on adoption of HP's Master Plan, the causation element must tie the City's approval of the HP Master Plan directly to the specific terms of the English Farms DA and *actual* resulting damages, not some speculative damages that are "remote, contingent, or speculative." Appellants cannot do so, and their claim must fail.

C. The Superior Court correctly held that the City did not operate in bad faith with respect to the English Farm DA, even under hypothetical facts.

In addition to the common elements of any contract claim (duty, breach, causation, and damages), "a bad faith claim also depends on proof that the breach complained of was unreasonable, frivolous, and unfounded." *Baldwin v. Silver*, 165 Wn. App. 463, 473, 269 P.3d 284, 289 (2011). The City's approval of the HP Master Plan was made in the context of the Section 30 Subarea Plan, the Section 30 Design Guidelines, the provisions of VMC 20.690, and the development agreement between the City and HP. Similar to the bad faith elements listed above, courts review legislative decisions under an "arbitrary and capricious" standard. *Palermo at Lakeland, LLC v. City of Bonney Lake*, 174 Wn.App. 64, 76, 193 P.3d 168, 173 (2008) (citing *Teter v. Clark County*, 104 Wn.2d 227, 234, 704 P.2d 1171 (1985)). This is generally defined as a decision that is both willful and unreasonable, basically unsupported by the underlying facts and circumstances; and courts will not overturn

legislative determinations so long as there is some conceivable state of facts that could justify the decision. *Id*.

The sheer volume of the record created during the City's legislative process on the Master Plan itself speaks to the fact that the City's actions were demonstrably not frivolous. Furthermore, the decision was based on numerous City ordinances and regulations and cannot in any sense be considered unfounded. Any inquiry into whether the City's actions were unreasonable must necessarily entail going back to the English Farm DA to ask what the reasonable expectations were of the parties to that agreement. Put quite simply, the English Farm DA describes what Appellants can do on their property – it does not, and was never intended to, circumscribe what neighboring property owners might choose to do on their own private property, let alone what land use approvals the City might entertain in connection with those uses. It is patently unreasonable for Appellants to argue otherwise.

D. The Superior Court's order dismissing Appellants' breach of contract claim was legally sufficient, given that findings of fact by a trial court are "superfluous" when dismissing a claim pursuant to CR 12(b)(6).

As noted above, because de novo review of dismissal of a claim under CR 12(b)(6) is based on the complaint and possible hypothetical facts, any findings of fact by the trial court are "superfluous." *Deegan v. Windermere Real Estate/Center-Isle, Inc.*, 197 Wn. App. 875, 884, 391 P.3d 582, 587 (2017). The Superior Court granted the City's motion to dismiss the breach of contract claim for the reasons argued by the City both in its briefing and during oral argument. While that is legally sufficient, the fact that such findings are superfluous makes it clear that any argument predicated on the notion that the findings were insufficient must logically, and legally, fail.

VI. Conclusion

Appellants have raised no legal basis to remand or reverse the Decision, as mere disagreement with the outcome does not justify their appeal. In addition, the Superior Court correctly

dismissed Appellants' breach of contract claim, because no set of facts, either plead or presumed, allows Appellants to use the shield of the English Farm DA, which protects their actions on their own property, as a sword to attack a process by which the City allowed a neighbor to pursue their own actions on a neighboring property. This case simply does not involve the "contract" of the English Farm DA at all. For all the foregoing reasons, the Superior Court's Order affirming the City's Decision should be upheld.

DATED this 30th day of June, 2022.

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CERTIFICATE OF COMPLIANCE

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH REQUIREMENTS

I certify that (1) this brief complies with the word-count limitations in RAP 18.17 and (2) the word count of this brief as described in RAP 18.17 is 3,585 words.

DATED this 30th day of June, 2022.

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CERTIFICATE OF SERVICE

I certify that on June 30, 2022, I served a copy of the foregoing document, described as **BRIEF OF RESPONDENT CITY OF VANCOUVER** on the following persons by electronic service:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct, and that this declaration was executed in Vancouver, Washington.

DATED: June 30, 2022

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